Supreme Court, U.S.
FILED

99-1415 DEC 1 1999

No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROSS ADAMS,

Petitioner,

v.

DAVID & BARBARA DRISCOLL,
RUEL & PATRICIA GALBREATH,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Ross Adams
3691 Old Bald Mountain Road
Blairsville, Georgia 30512
(706) 745-3679
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QUESTIONS PRESENTED

Whether federal courts have jurisdiction over storm water discharge citizen suits under the clean water act in the absence of an applicable effluent standard or limitation promulgated by the EPA or EPD, to which the federal court can compart the discharge of storm water by the defendant.

Whether a plaintiff who shows only that he uses and enjoys a privately owned body of water upstream from a navigable water used by the public, and who makes no showing that he uses the public navigable water, and who makes no showing the sediments ever reaches a body of water used by the public, has standing to bring a citizen's suit under the clean water act.

Whether it is fair for a person to file suit against another person on behalf of the United States of America and the defendant be found guilty without having a jury trial.

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United States Constitution Article III, section 2, clause 3

United States Constitution Article VII

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ross Adams, respectfully petitions this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the 11th Circuit in this case.

OPINIONS BELOW

The opinion of The United States Court of Appeals is reported in Appendix A. The opinion of The United States District Court is reported in Appendix B.

JURISDICTION

The court of appeals entered its judgment on July 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

The Clean Water Act

STATEMENT OF THE CASE

Toward the end of 1994, the petitioner used money he obtained through a bank loan to purchase 76 acres of land in Union County, State of Georgia. Union County is the petitioner's county of residence. The petitioner contracted with a timber-harvesting company called Sparks Lumber Company to harvest the saw timber off this

property. At some point during the operation, Sparks Lumber Company hired a man named Bobby Thomas to build roads to transport the harvested timber away from the 76-acre location. At the end of November 1995, Sparks Lumber Company ended its timber-harvesting operation on the land.

After Sparks Lumber Company completed its timber-harvesting operation, the petitioner hired a man named Emory Brackett to slash cut the remaining timber. This process went on until June of 1996. All land disturbing activities were done during the forestry operations.

The petitioner continues to maintain a county-approved sedimentation and erosion control plan on the land in question. No legal action or fines have ever been imposed by any county, state, or federal governmental agencies for his land development activities.

However, David Driscoll and Barbara Driscoll, residents of Florida, filed suit against the petitioner, alleging that he had violated the Clean Water Act. Donald Stacks, an attorney specializing in environmental law, represented the Driscoll's.

The Driscoll's own a vacation home below the petitioner's land. They have a small pond beside the vacation home. The stream that feeds this pond originates from a mountain spring on the petitioner's land. While Sparks Lumber Company built roads on the petitioner's land in 1994-1995, silt washed down from the petitioner's land and accumulated in the Driscoll's pond.

When the petitioner discovered that the Driscoll's were unhappy with the accumulation of silt in their pond, he offered to repair the pond.

The Driscoll's refused the petition's offer and filed suit. Ruel and Patricia Galbreath, who own land used for vacationing that adjoins the Driscoll's property, filed suit in conjunction with the Driscoll's. The pond on the Galbreath's property is fed by the water runoff from the Driscoll's pond.

The question at hand is whether the petitioner violated the Clean Water Act. Opinions are conflicting. In The United States District Court, Judge O'Kelley ruled in favor of Adams, in accordance with the magistrate court opinion. In The United States Court of Appeals, Judge Ed Carnes ruled in favor of the Driscoll's and Galbreath's.

The petitioner has not received a trial by jury in this case, despite his efforts to procure one. However, this right is afforded him by The United States Constitution.

Article III, section 2, clause 3 of the United States Constitution states: "The trial of all crimes, except in cases of impeachment, shall be by jury, and such a trial shall be held in the state where the crimes shall have been committed. . ."

Article VII of the United States Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Donald Stacks, council for the Driscoll's and the Galbreath's, cites several cases in his brief that are totally irrelevant in this case. In fact, most of the precedents he cites apply to the discharge of

chemical waste by factories, not the washing of natural sediment into a pond. The discharge of chemical waste into streams, rivers, and oceans is of great concern, but one cannot equate natural sediment (dirt) to the deliberate discharge of man-made chemical waste. The ridiculous nature of this case merits it be thrown out of court.

The petitioner has always been and continues to be, sensitive to the need for environmental law. The plethora of environmental issues that confront us-deforestation, air pollution, acid rain, water pollution, among many others-certainly need our immediate attention. But to misapply the laws we have put in place to remedy environmental problems further retards our efforts to improve our situation. The purpose of environmental law is to procure a safe, cleaner environment for ourselves and our children, not to allow one human being to unjustly take from another. Environmental law should never be used to allow a plaintiff to capitalize on the assets of others. With a large monetary award, the Driscoll's and the Galbreath's will certainly capitalize on the petitioner's assets, and set a precedent for more lawsuits similar to this one in the future.

REASONS FOR GRANTING THE PETITION

A Supreme Court ruling regarding the interpretation of The Clean Water Act would help mediate contradictory judgments by lower courts, as exemplified in this case.

Any action by the Supreme Court would aid county, state, and federal officials in interpreting and enforcing The Clean Water Act in its proper form. Present circumstances merit such a ruling, since there is much confusion among authorities as to how the law should

be interpreted.

The need for environmental law is great, but the need to enforce it properly is even greater. As this case exemplifies, some will try to capitalize on the assets of others, not in the sense of improving the conditions for which laws are made, but for personal financial gain.

Lower courts should not consider disputable facts without a trial, especially when there is so much to lose in terms of reputation and money. The petitioner works for no large corporation; he does not have several million dollars to hire a team of attorneys to represent him, nor does he have a large amount of cash on hand to pay court fees and settlements.

There is much to be reconciled in this case, in the interest of truth. There are witnesses who have not yet testified, as well as photographs and other evidence not yet seen by a judge.

In the interest of justice, the petitioner respectfully requests a trial by jury before he loses the ability to support his family.

CONCLUSION

The petitioner was granted a motion to dismiss, in the United States Federal District Court, Northern District of Georgia. At the United States Federal District Court, the Driscoll and Galbreath motion for summary judgement was denied.

The plaintiffs appealed this decision to the 11th Circuit Court of Appeals. As a result, both decisions of the lower courts were re-

versed and a ruling was entered against the petitioner.

In the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ross Adams

APPENDIX A
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn

In Replying Give Number
Of Case And Names of Parties

July 23, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-8532-CC Driscoll v. Adams
DC DKT NO.: 96-00175 2-CV-WCO

Enclosed is a copy of the court's decision filed today in this appeal. Judgement has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern cost, petitions for rehearing and mandate respectively.

To be timely, a petition for rehearing or for rehearing a suggestion of en banc consideration must be received in the clerk's office within twenty-one (21) days of the date of this opinion and judgement, except that: in **CIVIL** cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be **FORTY-FIVE (45 DAYS)** after entry of judgment. See Fed.R.App.P.40(a). No additional time for service by mail is permitted. See 11th Cir.R. 40-2.

If attorney's fees on appeal are authorized by law they must be sought

by filing a petition for attorney's fees with this office within fourteen (14) days of the date of this letter. Davidson v. City of Avon Park, 848 F.2d 172, 174 n.4 (11th Cir., 1998).

Pursuant to Fed.R.App.P.39,

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Nancy Gilman (404) 335-6151

Encl.

OPIN-1A (1-1999) [PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8532

D. C. Docket No. 2:26-CV-175-WCO

DAVID & BARBARA DRISCOLL, and
RUEL & PATRICIA GALBREATH,

Plaintiffs-Appellants,

versus

ROSS ADAMS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(July 23, 1999)

Before EDMONDSON and CARNES, Circuit Judges, and WATSON*, Senior Judge.

CARNES, Circuit Judge:

*Honorable James L. Watson, Senior Judge for the U.S. Court of International Trade, sitting by designation.

Plaintiffs David and Barbara Driscoll and Ruel and Patricia Galbreath appeal the district court's award of summary judgement to defendant Ross Adams on their Clean Water Act claim, which arose out of Adams' discharge of allegedly polluted storm water into a stream running from his property to ponds on their properties. Adams argues that the district court was correct in concluding that he is not subject to liability under the Clean Water Act because the Act imposed an impossible condition by requiring him to obtain a discharge permit that was unavailable in the state of Georgia. He also maintains that his discharge falls outside the scope of the Act because it was not a point source discharge of pollutant into a navigable water as defined by the Act. We reject both of those arguments and reverse the district court's grant of summary judgement.

I. FACTS AND PROCEDURAL HISTORY

At all times relevant to this case, Adams owned 76 acres of land in the North Georgia mountains. David and Barbara Driscoll owned approximately five acres adjacent to Adams' property, and Ruel and Patricia Galbreath owned about two acres adjacent to the Driscoll's property. The Spiva Branch stream flows downhill from Adams' property through a pond on the Driscoll's property and then through another pond on the Galbreath's property, before merging with the Nottely River, which flows across the Georgia-Tennessee border and unites with the Tennessee River. The Driscoll's and Galbreath's claim in their complaint, and the magistrate judge found, that storm water washed mud, silt, sand, and other materials from Adams' property into the Spiva Branch stream and thence into the plaintiffs' two ponds, while Adams was harvesting timber and developing his property.

Adams harvested timber on his property from March, 1995 to November, 1995. During the harvest, he cut and graded roads, installed storm pipes, and cut and removed timber. Adams then proceeded to develop the property, putting gravel on the roads, building culverts and check dams to channel the storm water runoff, and dividing the property into residential lots for vacation homes. The harvest and development caused erosion of mud, sand, and other materials on his property. Adams concedes that he did little to stabilize his property or prevent erosion until the spring of 1996, after the erosion had already caused a considerable amount of damage to the plaintiffs' properties. He says his delay in taking preventative measures was the result of inclement weather and winter cold.

Adams failed to seek the proper approval from any federal, state, or local government agency before starting work on his property. After all of the timber harvest and much of the development were

already completed, he filed for the required state permit in September 1996. He did not obtain a county development permit until February 1997, two months after the filing of the complaint in this lawsuit. As for federal law requirements, Adams never obtained a National Pollutant Discharge Elimination System ("NPDES") permit, which is required for lawful pollutant discharge under the Clean Water Act. The parties agree that an NPDES general storm water permit was not available because of a legal challenge to the permit. The plaintiffs contend, however, that other NPDES permits were available, including an individual storm water permit and both general and individual point source discharge permits.

The plaintiffs filed this lawsuit in December 1996 against Adams for violations of the Clean Water Act, 33 U.S.C. 1251-1376 (1994), pursuant to its citizen suit provision, 33 U.S.C. 1365. They also included in their complaint pendent state law claims for nuisance, trespass, negligence, among other things. They filed a motion for summary judgment, and Adams filed a motion to dismiss, which the district court treated as a cross motion for summary judgement. The court denied the plaintiffs' motion and granted Adams', stating that the requirement of an "NPDES permit was an impossible condition . . . [and] [t]here were no approved federal standards for how much sand, silt and mud could be in the released water." After disposing of the federal law claim, the court declined to retain supplemental jurisdiction over the state law claims and dismissed them without reaching the merits. The plaintiffs appealed.

We review de novo the district court's award of summary judgment. See B.R.L. Equip. Rentals Ltd. v. Seabring Marine Indus., Inc., 168 F.3d 413, 415 (11th Cir. 1999). We also review de novo the district court's conclusions' of law. See Brooks v. Miller, 158 F.3d 1230, 1236 (11th Cir. 1998).

II. DISCUSSION

Adams raises essentially two issues on appeal. First, he argues that the Clean Water Act's prohibition on pollutant discharge does not apply where the NPDES permit required to make the discharge lawful under the Act is not available. Second, he contents that his discharges in this case did not fall within the scope of prohibited pollutant discharges under the Act. We will address each contention in turn.

A. DOES THE CLEAN WATER ACT'S PROHIBITION ON "THE DISCHARGE OF ANY POLLUTANT BY ANY PERSON" APPLY WHERE THE NPDES PERMITS REQUIRED FOR LAWFUL DISCHARGE IS NOT AVAILABLE?

The Clean Water Act provides, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 22 U.S.C. 1311(a). Of the excepted sections, the only one potentially applicable in this case is 1342, which establishes the National Pollutant Discharge Elimination System and authorizes the Administrator of the EPA to issue permits under this system that allow the permit holder to discharge limited quantities of pollutants under prescribed conditions. See 33 U.S.C. 1342(a)(1). If the Administrator approves a state's permit program, the state may assume control of NPDES permitting for that jurisdiction. See 33 U.S.C. 1342(b).

Georgia has an approved state NPDES permit program. Pursuant to that program, the Georgia Environmental Protection Division ("EPD") has attempted several times over the past few years to issue a general NPDES storm water discharge permit. Unlike an indi-

vidual permit, which would apply to an individual discharger, the general permit would apply to an entire class of dischargers. To obtain coverage under a general permit, a would-be discharger could file a Notice of Intent form with the EPD. The EPD has been unable to implement any of its proposed general storm water permits because of court challenges brought by concerned citizens. Thus, the general NPDES storm water discharge permit is not and never has been available.

The plaintiffs argued in their briefs to us that although the general storm water discharge permit was not available to Adams, other acceptable NPDES permits, including an individual storm water discharge permit and other general and individual point source discharge permits, were available. Their counsel conceded at oral argument, however, that nothing in the record supports their contention that the EPD had ever actually issued any individual NPDES storm water discharge permits in Georgia. The record is equally devoid of any evidence suggesting that other general of individual NPDES point source discharge permits for storm water discharge were being issued in Georgia.

Thus, the issue in this case is whether 1311(a)'s zero-discharge standard applies to a discharger who could not obtain a NPDES permit because none was available. The Court has previously addressed the implications of unavailable NPDES permit under the Clean Water Act. We did so in Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), where the plaintiff sued developer JMS under the Clean Water Act for discharging storm water without an NPDES permit. See Hughey, 78 F.3d at 1524. The discharge was minimal, because JMS had implemented state-of-the-art sedimentation control devices in accordance with all state and local requirements. See id. at 1526. JMS had not obtained the required NPDES permit, how-

ever, because it was not available from the Georgia EPD. See id, at 1525.

In order to determine whether JMS had violated the Clean Water Act, we began our analysis with the text of the Act, concluding that "[t]he amended CWA absolutely prohibits the discharge of any pollutant by any person, unless the discharge is made according to the terms of [an NPDES] permit." See id. at 1524. But our commitment to the plain language of the Act was tempered by the well-established canon that "Congress is presumed not to have intended absurd (impossible) results." Id. at 1529. In an effort to strike a balance, we established a narrow exception to the general rule of liability for discharges without an NPDES permit where: 1) compliance with the zero-discharge standard was factually impossible because there would always be some storm water runoff from an area of development; 2) there was no NPDES permit available to cover such discharge; 3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and 4) the discharges were minimal. See id. at 1530. Thus, while acknowledging the Clean Water Act's zero-discharge standard, the Hughey decision, in light of the material facts of that case, recognizes a narrow exception to that standard for any minimal discharge that occurs despite a developer's best efforts to reduce the amount of it and comply with applicable law. See id. We make it clear that all four of the elements were essential to the exception. See id.

Two of the Hughey elements are lacking in this case. First, unlike the discharger in Hughey, who had "made every good-faith effort to comply with the Clean Water Act and all other relevant pollution control standards" by implementing pollution-control measures and obtaining local permits, id., in this case Adams did little or noth-

ing to limit erosion or storm water discharge before beginning construction. He sought none of the required permits until after considerable damage has been done to the Driscoll's and Galbreath's properties. Second, we emphasized in Hughey that "[t]he facts of this case necessarily limit our holding to situations in which the storm water discharge is minimal, as it was here." Id. By contrast, in this case the amount of Adams' storm water discharge and the resulting damages were substantial. Indeed, the plaintiffs proffered evidence indicating that approximately 64 tons of sediment were deposited into their ponds as a result of Adams' activities. The factual disparities between Hughey and this case compel the conclusion that the exception recognized in Hughey does not apply here.

Adams argues that even if the Hughey exception does not apply, the Clean Water Act should not be interpreted to impose a default zero-discharge standard where no NPDES permit is available. He contends, in essence, that if the Act is interpreted as requiring a discharge permit which cannot be obtained, then the law requires an impossibility, with the net result being there is no restriction on his right to discharge. That contention is inconsistent with the Hughey opinion and our understanding of the law.

We agree with Hughey that, but for the limited exception recognized in that case, "[t]he amended CWA absolutely prohibits the discharge of any pollutant by any person, unless the discharge is made according to the terms of [an NPDES] permit." Id. at 1524. That decision staked out a path developers wishing to avoid liability can follow where no permit is available and where it would otherwise be impossible to develop their land without causing some discharge: the developer must be in good faith compliance with all state and local requirements prior to any discharge and must reduce the discharge to a minimum. See id. at 1530. Because it is feasible for

a developer to take the steps required to qualify for the Hughey exception - after all, the developer in that case took them - Adams' impossibility argument fails.

We note that our readings in Hughey of the Clean Water Act as prohibiting (with one narrow exception) all discharges without a permit is consistent with the Fifth Circuit decision published almost contemporaneously with Hughey. In Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546 (5th Cir. 1996), the Sierra Club sued Cedar Point Oil under the citizen suit provision of the Clean Water Act, alleging that Cedar Point's discharges of produced water (a by-product of oil and gas drilling which consists of water and chemicals used in the drilling process) into Galveston Bay without an NPDES permit violated the Clean Water Act. See Sierra Club, Lone Star Chapter, 73 F3d at 550-51. The EPA had never issued a permit for produced water discharges or promulgated specific effluent limitations for the "Coastal Subcategory" of oil and gas producers, to which Cedar Point belonged. See id. at 552-53. Cedar Point argued that because of the EPA's failure in that regard, it could not be liable for violating the Clean Water Act. See id, at 559.

The Fifth Circuit rejected Cedar Point's position. Like we did in Hughey, the Fifth Circuit observed that the plain language of the Clean Water Act imposes liability for discharges without a permit and facially admits of no exception where the required permit is not available. See id. The court went on to examine the legislative history of the Act, concluding that the history supported its interpretation of the text. The court stated:

> We agree with Cedar Point that Congress initially intended that a citizen suit based on a violation of 1311(a) for discharging

> pollutants without a permit would only lie where EPA had issued a relevant effluent limitation or permit; that is, where the defendant was discharging pollutants without a permit because he had failed to obtain a permit that was available, rather than because EPA had failed to issue such permits. This intent is clearly established by the inclusion of particular dates in the statute, as explained by the legislative history.

Id. at 559-60. The court determined, however, that Congress did not intend for the unavailability of an NPDES permit to excuse discharges indefinitely. Congress provided that the citizen suit provision would become effective almost nine months after enactment of the Clean Water Act, in order to allow "sufficient time . . . for the State and Federal governments to develop fully, and execute the authority contained in [1342, which provides for NPDES permits]." Id. at 560 & n.27 (quoting S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971)) (emphasis omitted). Because that effective date and others have long since passed, and Congress has not postponed them or placed any other restrictions on bringing suit, the court concluded it would defeat Congressional intent to extend those dates indefinitely. See id. at 560-61.

The Fifth Circuit's decision in Sierra Club, Lone Star Chapter reinforces our interpretation of the Clean Water Act in Hughey. For the reasons set forth in those two decisions, we reject Adams' position that the Clean Water Act's zero-discharge standard does not apply where the required NPDES permit is not available. We decline to extend the narrow exception recognized in Hughey to cover the circumstances presented in this case.

B. DID ADAMS' DISCHARGES FALL WITHIN THE SCOPE OF PROHIBITED POLLUTANT DISCHARGES UNDER THE CLEAN WATER ACT?

Adams also contends that this court should affirm the district court's award of summary judgment to him for two additional reasons. First, he argues that the materials he discharged into the Spiva Branch stream was not a "pollutant" under the Clean Water Act. Second, he contends there was no "discharge of pollutant" within the meaning of the Act, both because the storm water runoff did not come from a "point source," and because the Spiva Branch stream, being a small-volume stream that flows only intermittently, is not navigable water. These two contentions are without merit.

As to the first one, the definition of "pollutant" in the Act is broad, including, among other things, "rock, sand, cellular dirt and industrial, municipal, and agricultural waste. . . . " 40 C.F.R. 122.2. Sand and silt were two of the primary constituents of the sediment deposited in the plaintiffs' ponds as a result of the runoff from Adams' property. Moreover, the Hughey court specifically held that "[w]hen rain water flows from a site where land disturbing activities have been conducted, such grading and clearing, it falls within the description." Hughey, 78 F.3d at 1525 n.1.

As to Adams' second contention, a "point source" includes "any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit" and so on. 40 C.F.R. 122.2. here, it is undisputed that Adams collected storm water by pipes and other means, and that the storm water, was discharged into the stream. Furthermore, the Spiva Branch stream is a "navigable water" within the meaning of the Act. In United States v. Eidson, 108 F.3d 1336 (11th Cir. 1997), we described the expansive reach of

the term "navigable waters" as follows:

> The CWA [Clean Water Act] defines "navigable waters" as "waters of the United States, including territorial seas." 33 U.S.C. 1362(7). This broad definition "makes it clear that the term 'navigable' as used in the Act is of limited import" and that with the CWA Congress chose to regulate waters that would to be deemed navigable under the classical understanding of that term. . . . Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States" under 1362(7). Likewise, there is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently.

Eidson, 108 F.3d at 1341-42 (holding that a man-made drainage ditch was a navigable water under the Clean Water Act) (citations omitted). Thus, the Spiva Branch stream is a "navigable water" under the Clean Water Act, even if it flows only intermittently.

III. CONCLUSION

We REVERSE both the district court's award of summary judgment to Adams and the denial of summary judgment to the plaintiffs on the Clean Water Act claim, VACATE the district court's dismissal of the state law claims, and REMAND for further proceedings consistent with this opinion.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number Of Case And Names of Parties

September 17, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-8532-CC Driscoll v. Adams
DC DKT NO.: 96-001-75 2-CV-WCO

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Karen Turner/ck (404) 335-6172

Enc

REHG-1 (1-1999)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8532-CC

DAVID DRISCOLL, BARBARA DRISCOLL,
RUEL GALBREATH, and PATRICIA GALBREATH,
Plaintiffs-Counter-Defendants-Appellants,

versus

ROSS ADAMS,
Defendant-Counter-Claimant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____F.2d_____).

Before: EDMONDSON AND CARNES, Circuit Judges, and WATSON*, Senior Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATE CIRCUIT JUDGE

ORD-42(6/95)

*Honorable James L. Watson, Senior Judge for the U.S. Court of International Trade, sitting by designation.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

DAVID and BARBARA DRISCOLL	:	
RUEL and PATRICIA GALBREATH	:	CIVIL ACTION NO.
	:	2:96-cv-175-WCO
Plaintiffs	:	
	:	
ROSS ADAMS	:	

Defendant :

:

:

JUDGMENT

This action having come before the court, Honorable William C. O'Kelley, Senior United States District Judge, for consideration of magistrate's report and recommendation, and the Court having adopted the report and recommendation as the order of the Court DENYING plaintiffs' motion for summary judgment and GRANTING defendant's motion for summary judgment, it is

ORDERED AND ADJUDGED that the plaintiffs, David and Barbara Driscoll and Ruel and Patricia Galbreath, recover nothing of the defendant, **ROSS ADAMS**, that the action be dismissed and that the defendant recover of the plaintiffs costs of this action.

Dated at Gainesville, Georgia, this 30th day of March, 1998.

LUTHER D. THOMAS, CLERK
By: _____
Deputy Clerk

Filed & entered in Clerk's Office
This 30th day of March, 1998.
LUTHER D THOMAS, CLERK
By:_____
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

DAVID and BARBARA DRISCOLL	:	
RUEL and PATRICIA GALBREATH	:	CIVIL ACTION NO.
	:	2:96-cv-175-WCO
Plaintiffs	:	
	:	
ROSS ADAMS	:	
	:	
Defendant	:	
	:	

ORDER

The captioned case is before the court for consideration of the magistrate judge's report and recommendation [50-1]. The report and recommendation was filed on February 10, 1998. The magistrate judge recommends that the plaintiffs' motion for summary judgment be denied [32-1] and defendant's motion to dismiss, treated herein as a motion for summary judgment, be granted [21-1]. Plaintiffs filed objections to the report and recommendation on February 20, 1998. The court heard oral argument on the pending motions on March 23, 1998.

This case arises out of construction activities undertaken by defendant on defendant's property. Plaintiffs sued defendant alleging violations of the Federal Clean Water Act (CWA) as well as various state law claims. The magistrate judge recommends that plaintiffs' claim under CWA be dismissed pursuant to Hughey v. JMS Development Corp., 78, F.3d 1523 (11th Cir. 1996). The magistrate judge

further recommends that plaintiffs' state law claims be dismissed for lack of jurisdiction. See Faucher v. Rodziewicz, 891 F.2d 864 (11th Cir. 1990). This court agrees.

After careful review of plaintiffs' objections, the court is satisfied that the magistrate judge's report and recommendation is accurate as a matter of law and fact. Accordingly, the court hereby ADOPTS the report and recommendation as the order of this court [50-1]. Plaintiffs' motion for summary judgment is hereby DENIED [32-1]. Defendant's motion to dismiss, treated herein as a cross motion for summary judgment, is hereby GRANTED [21-1].

IT IS SO ORDERED this 25th day of March, 1998.

WILLIAM C. O'KELLEY
Senior United States District Judge